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No. 86-765

In The
Supreme Court of the United States
October Term, 1986

MISSOURI PACIFIC RAILROAD COMPANY
and JOSEPH FALVEY,

Petitioners,

v.

C. RANDOLPH EVANS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Did the Eighth Circuit err remanding a slander and FELA action back to the state court when the action neither "arises under" Railroad Labor Act nor shows a federal right as an essential part of the claim? Or as otherwise stated: Does the Railway Labor Act preempt actions for slander and Federal Employer's Liability Act violation where the causes of action are not inextricably intertwined with a grievance under or interpretation of a collective bargaining agreement?

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OPINIONS BELOW

The opinion of the Court of Appeals reversing the judgment of the District Court and ordering the case to be remanded to the Circuit Court of the City of St. Louis, Missouri is reported at 795 F.2d 57 (1986) and is reprinted in Petitioners' Appendix 1a-5a. The opinion of

the District Court granting the Petitioners' motion to dismiss is reported at 618 F. Supp. 930 (E.D. Mo. 1985) and is reprinted at Petitioners' Appendix 6a-11a.

STATUTES INVOLVED

1. Section 3 First (i) of the Railway Labor Act, 45 U.S.C. Section 153 First (i), provides in relevant part:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the [National Railroad] Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

2. 28 U.S.C. Section 1331 provides:

> "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

3. 28 U.S.C. Section 1337(a) provides in relevant part:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce . . .".

4. 28 U.S.C. Section 1441(a) provides:

"Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

5. 28 U.S.C. Section 1445(a) provides:

"A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51-60 of Title 45, may not be removed to any district court of the United States."

6. Section 1 of the Federal Employers' Liability Act, 45 U.S.C. Section 51, provides in relevant part:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . .".

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STATEMENT OF THE CASE

Respondent, C. Randolph Evans ("Evans"), filed an action in the Circuit Court of the City of St. Louis, Missouri, against Missouri Pacific Railroad Company and Joseph Falvey, a car foreman, alleging common law slander and injury and damages pursuant to the Federal Em-

ployers' Liability Act ("FELA"). (Petitioners' App. 17a-20a)

Missouri Pacific Railroad Company ("Missouri Pacific") filed a petition for removal alleging that the Railway Labor Act, 45 U.S.C. Section 153, preempted state law and presents a federal question. Further, Missouri Pacific prayed in its removal petition that Evans' petition filed in the Circuit Court of the City of St. Louis should be removed to the United States District Court for the Eastern District of Missouri for trial and determination. (Petitioners' App. 14a-16a)

The matter was removed to the district court, and then Missouri Pacific moved to dismiss contending that the relief sought by Evans was preempted by the Railway Labor Act ("RLA"), *supra,* and Evans' only avenue of relief would be through arbitration. The district court granted Missouri Pacific's motion to dismiss, Evans appealed to the Eighth Circuit Court of Appeals; whereupon, that court remanded Evans' action to the Circuit Court of the City of St. Louis.

A statement made on page five of the Petitioners' Petition for Writ of Certiorari is incorrect. The Petitioner states that Evans "asserted seniority rights under the governing collective bargaining agreement which, in his view, entitled him to displace another Missouri Pacific employee from a particular carman position", and "Missouri Pacific convened an employment hearing to determine [Evans'] eligibility for the desired position . . . [and that] [d]uring the course of that hearing, . . . Falvey, a Missouri Pacific car foreman, allegedly stated that the respondent was a liar and could not be trusted to tell the

truth'' (Petition, page 5, paragraph 1). The correct representation of what is alleged is provided in Evans' complaint filed in the state court. One can see from paragraphs four, five and six of the Respondent's original Petition for Damages (Petitioners' App. 18a) there was no hearing in which slanderous statements were made, but rather, the slanderous statements were made during "employment procedures for the purpose of determining the personnel that would occupy the positions that were available". In other words, the slanderous statements were made when Evans was getting his job back. The purpose of this allegation in the Petition for Damages was merely to show an agency relationship between Falvey, the car foreman, and the Missouri Pacific Railroad. No claim was asserted attacking any grievance procedure or interpretation of a collective bargaining agreement.

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REASONS FOR DENYING THE WRIT OF CERTIORARI

The Decision Of The Eighth Circuit Is Neither In Conflict With Other Courts Nor Is Inconsistent With The Holdings Of This Court.

The decision of the Eighth Circuit is neither in conflict with the Courts of Appeals for the Fourth, Sixth, Seventh and Ninth Circuits nor against this Court's long-standing view regarding the preemption of a state claim where comprehensive Federal legislation is argued to be dispositive. The Eighth Circuit's decision is firmly predicated on this Court's analysis of removal and/or original federal jurisdiction and when the jurisdiction should be

entertained. *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1, 77 L.Ed.2d 420, 103 S.Ct. 2841 (1983).

In *Franchise Tax Board, supra,* the court makes a distinction between what constitutes a "well-pleaded" complaint versus an "artfully pleaded" complaint. The "artfull pleading" is one that avoids a federal question but can not because the action stands at least in part on it. 28 U.S.C. Section 1331 provides, in part, that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." In order for the "artful pleading" standard to be applied to an action in the state court, it it essential that the essence of the state action, at least to a material element, arises under the law that creates the cause of action. The Eighth Circuit disagreed with the Petitioners' argument that Evans' complaint was drafted in an attempt to get "around . . . a federal cause of action." (Petitioners' App. 3a) The Eighth Circuit found that Respondent's complaint does not show a federal right as an essential element of his claim and, therefore, should not be removed and original federal jurisdiction should not be entertained. Although, the FELA rights arose through federal legislation, a party has right to file his FELA action in a state court unfettered by the threat of removal. 28 U.S.C. Section 1441(a) provides: "A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51-60 of Title 45, may not be removed to any district court of the United States."

Where there is a dispute as to the application of federal law, speculation and conjecture will not meet the

threshold of what is needed to invoke federal preemption. *Gully v. First National Bank,* 299 U.S. 109 at 112, 57 S.Ct. 96 at 97, 81 L.Ed. 70 (1936)

Granted, in *Franchise Tax Board, supra,* the court recognized that even though a state law creates a cause of action the case might still arise under the laws of the United States if the complaint implies that the right to relief under state law requires a resolution of substantial question of federal law; but, Evans' petition needs no such proof or resolution of a substantial question of federal law. The existence of the Railway Labor Act and rights accruing thereunder or the interpretation of a collective bargaining agreement are irrelevant to Evans' cause of action.

Evans in this case did not defeat removal by omitting to plead federal questions in his complaint. Evans' complaint stands on its own, separate and distinct from any comprehensive federal legislation that purportedly controls the railway industry.

The contention made by the petitioners that the Fourth, Sixth, Seventh and Ninth Circuits [Petition for Writ of Certiorari, page eight] are holdings that are in conflict with the Eighth Circuit is the result of the Petitioners' limited analysis of the propriety of removal jurisdiction in the alleged preempted areas; the analysis should continue to inquire as to whether the state claims are inextricably intertwined with a federal right or law.

Looking at the Petitioners' "conflicting" authorities, one sees:

In *Graf v. Elgin, Joliet & Eastern Ry. Co.,* 790 F.2d 1341 (7th Cir. 1986), the court was presented with a com-

plaint wherein the action of the Elgin, Joliet & Eastern Ry. Co. involved a wrongful termination and discharge of Graf, its employee, which, admittedly, comes within the minor dispute provisions of the Railway Labor Act. Evans does not contend here that actions that relate to work rules, terminations from employment, or disciplinary procedures do not come within the exclusive provisions of the RLA.

McKinney v. International Association of Machinists and Aerospace Workers, 624 F.2d 745 (6th Cir. 1980), involved a claim made by an employee of Southern Railway Co. that the railroad company violated an employment contract which was a result of a collective bargaining agreement and that the union breached its duty for fair representation. Evans does not rely on any collective bargaining agreement nor does he rely on the failure or inadequacy of representation that he received from his union as a basis for his relief. Evans' action does not arise out of the procedures established by the RLA as did the Plaintiffs in *McKinney*.

Taylor v. General Motors Corp., 763 F.2d 216, 220 (6th Cir. 1985), *cert. granted*, 54 U.S.L.W. 3561 (U.S. Feb. 24, 1986) (Nos. 85-686 and 85-688), again presents a question of retaliatory discharge which is clearly distinguishable from actions of slander and violations under FELA that lack any nexus to work rules, discharge or any rights founded upon any collective bargaining agreement.

Schroeder v. Trans World Airlines, Inc., 702 F.2d 189 (9th Cir. 1983), was an action brought by TWA employees in a complaint that may be considered to be "artfully pleaded" as opposed to being "well-pleaded" because there

was an attempt by TWA employees to avoid federal jurisdiction dealing with controversies and grievances that involved *discharge and unsatisfactory performance.* Likewise, *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978), because in *Magnuson* the wrongful dismissal of an employee was at issue.

Therefore, *Schroeder, Magnuson, Graf, McKinney* and *Taylor* are not in conflict with the Eighth's Circuit's ruling in this case where it held that removal was improper and federal original jurisdiction did not exist for the reason that the complaint of Evans had nothing to do with any grievance that would come within the purview of the "minor dispute" remedies under RLA.

The Petitioners' suggestion that state courts cannot render uniform application of the preemptive exclusivity of the Railway Labor Act not only interferes and impedes with the legitimate and bona fide state interests and its right to administer said interests but, also, ignores the fact that there has been a consistent application of the Railway Labor Act. Consistent, because in those cases involving interpretations and grievances that are inextricably intertwined with a collective bargaining agreement, namely, wrongfully discharges, disciplinary action, work rules, and even alleged slanderous statements made at grievance hearings, the courts have found that the Railway Labor Act's comprehensive administration of minor disputes precludes state action. *Koehler v. Illinois Central Gulf R. Co.*, 488 N.E.2d 542 (Ill. 1985), *cert. denied*, 54 U.S.L.W. 3859 (U.S. June 30, 1986) and *Barchers v. Missouri Pacific R. Co.*, 669 S.W.2d 235 (Mo. Ct. App. 1984) When considering a well-pleaded complaint, the state courts have held uniformly that claims not arising out of, or being dependent on, federal

law and which do not stem from a grievance or interpretation of a collective bargaining agreement, to-wit, slander and intentional infliction of mental distress, independent of disciplinary action and discharge proceedings and original federal jurisdiction will not be entertained. A review of the above cases demonstrates the consistency of state courts.

Koehler, once again, is a case alleging retaliatory discharge wherein the Supreme Court of the State of Illinois, on reconsideration, had determined that retaliatory discharge cases against a railroad are preempted by the minor dispute provisions of the RLA.

Barchers, supra, wherein a railroad employee brought a libel action against the railroad, although having similarity to this case in that Barchers and Evans both brought libel actions, the libel action brought by Barchers relates to a proceeding conducted under the RLA and where the alleged libel occurred during a hearing conducted to determine if sanctions should be placed against Barchers, the railroad employee, or if he should be terminated. The court in *Barchers* determined that the libel "grew out of" the grievance in that the statements were made during a hearing predicated on a matrix of facts that were "inextricably intertwined with the grievance machinery". [The *Barchers* court also had another compelling reason to deny the claim, namely, that a qualified privilege existed during the hearing and Barchers publicized the libel as opposed to the railroad causing the publication.]

As we continue our review of state court applications of the RLA, we see in *Pikop v. Burlington Northern R. Co.*, 390 N.W.2d 743 (Minn. 1986), an employee of a railroad

bringing an action for intentional infliction of emotional unrest. The claim of intentional infliction of emotional unrest did not stem from interpretation of the collective bargaining agreement that was entered into between the employee's union and the railroad.

Also note *DeTomaso v. Pan American World Airways, Inc.*, 220 Cal.Rptr. 493, 174 Cal.App.3d 1023, 184 Cal.App.3d 344 (Feb. 18, 1986), where, again, the court found the gravamen of the cause of action by an airline employee was not wrongful discharge but, rather, was an action legally independent of any contractual claims or grievances which that employee had that might be arbitrable.

Therefore, the citations provided by the Petitioners not only demonstrate that the Eighth Circuit decision to remand is not in conflict with the other circuits but, further, provide this Court a clear and convincing contrast between the action brought by Evans as compared to the plaintiffs who were preempted by the RLA.

Parenthetically, the Petitioners' suggestion that *Carson v. Southern Ry. Co.*, 494 F. Supp. 1104 (D.S.C. 1979), had determined that libel actions come within the "minor dispute" exclusivity of the RLA is misplaced in that, as in *Barchers, supra,* the slanderous statements in *Carson* were made and arose under the collective bargaining agreement.

The court in *DeTomaso,* as in *Franchise Tax Board, supra,* and *Gully, supra,* stand for the proposition that "where interference of federal legislative scheme was at most speculative, one should not impose the preemption

of the legislation." The court recognized in *DeTomaso* that wrongful discharge actions are minor disputes and are subject to RLA procedures and are routinely held to be within the arbitrable authority created by the statute; however, the court, as the Eighth Circuit in this case found, that the plaintiff was not simply trying to re-label claims arising from discharge but, rather, DeTomaso's claims were legally independent of any contractual claims or grievances that he had, or might have had, that were arbitrable.

The preemption doctrine seeks to accommodate the interest of uniform national regulation on one hand and the preservation of federalism on the other. Thus, the fact that Congress has entered into a field of regulation does not necessarily preclude all state action in the area.

The Supreme Court recently noted in *Chicago & North Western Transportation Co. v. Kalo Brick and Tile Co.*, 450 U.S. 311, 317, 101 S.Ct. 1124, 1130, 67 L.Ed.2d 258 (1981), that [p]reemption of state law by federal statute or regulation is not favored in the absence of pervasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."

The RLA seeks to avoid disruption in railway transportation by providing a process for the resolution of major disputes. *Elgin, Joliet & Eastern Ry. Co. v. Burley*, 325 U.S. 711, 722-723, 65 S.Ct. 1282, 1289, 89 L.Ed. 1886 (1945). Congress did not expressly preempt the RLA in enacting the RLA. The RLA is, no doubt, comprehensive in its regulation of the process relating to collective bargaining agreements. This falls within the major dispute

category of the RLA. In addition, Congress included in the RLA a method of resolving so-called minor disputes defined as disagreements over the interpretation or application of existing collective bargaining agreements. The RLA established an adjustment board to resolve these disputes.

In *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30 at 33, 77 S.Ct. at 636 (1957), this Court defined minor disputes as "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation, generally involving only one employee." Because of the comparatively minor character and the general improbability of minor disputes generally involving only an individual causing interruption of peaceful relationships between employees and employers or transportation, the RLA sets major disputes apart from minor disputes.

The RLA does not afford Evans a remedy for the slanderous act which deprives Evans of his reputation and standing in the community. Only if the slander was committed at a time and place that was inextricably intertwined with the interpretation of a grievance of a collective bargaining agreement would the purposes sought by the RLA be satisfied. To allow the state to protect Evans from the conduct of another where it does not involve collective bargaining processes or the interpretations of an agreement does not emasculate or impede the com-

prehensive application of the RLA. In accord, *Farmer v. United Brotherhood,* 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed. 338 (1977).

The holdings of *Franchise Tax Board, supra, Avco Corp. v. Aero Lodge No. 735,* 390 U.S. 557 (1968), *aff'ing* 376 F.2d 337 (6th Cir. 1967); *Gully v. First National Bank,* 229 U.S. 109 (1936); and *Farmer v. United Brotherhood,* 430 U.S. 290, 97 S.Ct. 1056 (March, 1977) leave little uncertainty as to the application of RLA when a state action is filed. If the state claim is "artfully pleaded" avoiding the federal controlling authority or is "well-pleaded" where a necessary element of proof is predicated on federal law and/or when the cause of action arises under federal law, then removal and original federal jurisdiction should be entertained. Where the complaint is "well-pleaded" and stems from conduct not inextricably intertwined with a federally comprehensive law, then courts as the Eighth Circuit has done should not grant removal jurisdiction.

Franchise Tax Board, Farmer, supra, have provided the guidelines leaving little need for this Court to review the Eighth Circuit's holding that Evans' complaint should be remanded to the state court. A conflict in the Circuits and in the state courts' application of the comprehensive authority of the RLA is not present. In fact, the propriety RLA preemptive legislation has been finely honed.

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CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

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